

ST 99-31

Tax Type: Sales Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS,**

v.

**"MARY MOSBY", as responsible officer
of "Rest-Away Bedding Co.,**

Taxpayer

**No. 98-ST-0000
IBT No. 0000-0000
NPL No. 0000**

**Linda K. Brongel
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Robert S. Krockey for "Mary Mosby"; John Alshuler, Special Assistant Attorney General, for the Department of Revenue.

SYNOPSIS:

This matter comes on for hearing pursuant to "Mary Mosby's" (hereinafter "taxpayer") protest of Notice of Penalty Liability ("NPL") Number 0000 and the Notice of Deficiency ("NOD") issued by the Department against her on May 28, 19xx and May 29, 19xx, respectively, as responsible officer of "Rest-Away Bedding Co" (hereinafter "Rest-Away"). The NPL represents a penalty liability for Retailers' Occupation Tax admitted by "Rest-Away". as due to the Department for the periods April 19xx through June 19xx and January 19xx through February 19xx, but which is unpaid. The NPL also includes April 19xx and May 19xx for which no returns were filed. The

NOD represents a penalty liability for withholding taxes for the second quarter 19xx and second quarter 19xx.

The issues to be resolved are 1) whether the taxpayer was a responsible officer of "Rest-Away Bedding Co.", and thereby required to file returns and pay over the taxes involved and 2) whether the taxpayer willfully failed to collect, truthfully account for and pay over such taxes.

A hearing in this matter was held on February 10, 1999. Following the submission of all evidence and a review of the record, it is recommended that the NPL and NOD be cancelled in part and affirmed in part.

FINDINGS OF FACT:

1. The Department's *prima facie* case was established by the admission into evidence of the Notice of Penalty Liability ("NPL"). The NPL dated May 28, 19xx, reflects a total liability due and owing in the amount of \$27,718.43 for the periods April 19xx through June 19xx and January 19xx through February 19xx and April 19xx through May 19xx. The NOD dated May 29, 19xx reflects a total liability due and owing of \$1,528.18 for the second quarter 19xx and the second quarter 19xx. (Dept. Ex. No. 1)
2. Taxpayer sold 100 percent of the stock of "Sleep-Away" to "Saul Simpson" ("Simpson") on March 22, 19xx. The stock was held in escrow pending "Simpson's" payment to her. (Taxpayer's Ex. Nos. 2, 3)
3. According to the U.S. federal income tax return for "Sleep-Away" for the period ending May 31, 19xx "Simpson" and his daughter were the only two officers of "Sleep-Away" (Taxpayer's Ex. No. 7)
4. Taxpayer did not have signature authority of the corporate bank accounts. (Taxpayer's Ex. Nos. 1, 2)

5. Mr. "Simpson" left the business in February 19xx. At that time he owed taxpayer \$300,000.
(Tr. p. 36)

6. Taxpayer opened a personal bank account at the "Small Town" Bank in March 19xx and paid debts of "Sleep-Away" from that account. Taxpayer made payments on the installment agreement that had been arranged between "Sleep-Away" and the Department of Revenue for unpaid taxes. Taxpayer also paid one-half of February 19xx and the March 19xx ROT from that account.
(Taxpayer's Ex. Nos. 12, 13)

7. Taxpayer also paid herself \$250 per week from this account. (Taxpayer's Ex. No. 12)

CONCLUSIONS OF LAW:

There are two types of tax at issue here. The Department seeks to impose personal liability on the taxpayer pursuant to Section 1002(d) of the Illinois Income Tax Act for the failure to pay withholding taxes. The Department also seeks to impose personal liability on the taxpayer for failure to remit Retailers' Occupation Tax ("ROT").

The personal liability penalty for both taxes is imposed by Section 3-7 of the Uniform Penalty and Interest Act, which provides as follows:

Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who wilfully fails to file the return or make the payment to the Department or wilfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount unpaid by the taxpayer including interest and penalties thereon.

There is a question as to what the taxpayer's role was in the corporation. According to the statute, it is not necessary to be an officer of the corporation for liability to be imposed. If, as an employee, the individual has the control, supervision or responsibility of filing returns and making payment of the tax, and wilfully fails to file such return or to make such payment, he will be subject

to personal liability. In determining whether an individual is a responsible person the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and the disbursal of funds. *See, e.g., Monday v. United States*, 421 F.2d 1210 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. *Id.*

The evidence shows that prior to January 19xx taxpayer had no role in the corporation other than as a creditor of Mr. "Simpson". By means of the stock purchase agreement between her and Mr. "Simpson" she had relinquished all control of the corporation to him. Accordingly, she could not be held to be a responsible officer of the corporation during the period that Mr. "Simpson" was in control of the corporation. It is my recommendation, therefore, that the Notice of Penalty Liability be disallowed for the periods April 19xx through July 19xx and January 19xx. Similarly the Notice of Deficiency for the second quarter 19xx is cancelled.

After January 19xx, however, taxpayer entered the business and ran it in order to salvage her investment. While she did not use the corporate checking account, she opened a new account from which she wrote checks to pay the bills. According to her testimony, all of the money that was placed in the account at the outset came from her personal funds. Of course, the income from any sales made during this period was also placed in this account and used to pay bills. Taxpayer had the exclusive power to determine who would be paid and who would not. She was in a responsible position in which she should have known whether the tax returns were filed and the liabilities paid. *See Monday v. United States*, 421 F.2d 1210 (7th Cir. 1970), *cert. denied*, 400 U.S.

821 (1970); Mazo v. United States, 591 F.2d 1151 (5th Cir. 1979) (responsibility is a matter of status, duty and authority, not necessarily knowledge).

During this period of time taxpayer made numerous payments to various governmental entities for taxes due and owing including the Illinois Department of Revenue. Some of the payments made by her were toward the installment plan which Mr. "Simpson" had entered into with the Department of Revenue. Taxpayer's counsel argues that taxpayer would not have been personally liable for the taxes on which the payment plan was in effect and on which she made payments, and therefore she should be given credit for those payments against any potential liability. I find taxpayer's argument unpersuasive. It was her decision to keep the business open and it appears that in order to do so she continued to make the installment payments on the prior periods taxes. These taxes were a legitimate debt of the corporation and the fact that she made these payments cannot absolve her of personal responsibility for those other taxes which were not paid. Since taxpayer was in a position to direct that the taxes be paid, she is a responsible party pursuant to Section 3-7 of the UPIA for the period January 19xx through June 19xx.

The second element which must be met in order to impose personal liability is the willful failure to pay the taxes due. The Department presents a *prima facie* case for willfulness with the introduction of the NPL into evidence. Branson v. Dept. of Revenue, 168 Ill.2d 247 (1995). The burden, then, is on the responsible party to rebut the presumption of willfulness. Although taxpayer is a sympathetic figure, she was in a position to direct that the taxes be paid and chose to pay other bills with the available funds. Accordingly, she has failed to rebut the Department's *prima facie* case for the period February 19xx and April 19xx through May 19xx regarding ROT and the second quarter 19xx regarding withholding taxes.

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Penalty Liability be cancelled for the periods April 19xx through July 19xx and January 19xx. As to the periods February 19xx and April 19xx through May 19xx the Notice of Penalty Liability is affirmed. As regards the Notice of Deficiency, it is my recommendation that the NOD be cancelled for the second quarter of 19xx and affirmed for the second quarter of 19xx.

Date: 4/30/99

Linda K. Brongel
Administrative Law Judge